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Supreme Court of the United States

OCTOBER TERM, 1932.

SAM HAWKS, J. F. McKEEL and LEW WENTZ Constituting the State Highway Commission of Oklahoma; J. BERRY KING, Attorney General of Oklahoma; PURMAN WILSON, County Attorney of McClain County, Oklahoma; PERSON WOODALL, County Attorney of Cleveland County, Oklahoma; and J. R. EVATT, A. O. MADDOX, J. E. COLBERT, J. C. TODD, GEORGE CARPENTER and GEORGE N. CHURCH,

Petitioners,

vs.

CHARLES H. HAMILL and WILLOUGHBY G. WALLING,

Respondents.

No. 147

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Assistant Attorney General.

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OCTOBER TERM, 1932.

SAM HAWKS, J. F. McKEEL and LEW WENTZ Constituting the State Highway Commission of Oklahoma; J. BERRY KING, Attorney General of Oklahoma; PURMAN WILSON, County Attorney of McClain County, Oklahoma; PERSON WOODALL, County Attorney of Cleveland County, Oklahoma; and J. R. EVATT, A. O. MADDOX, J. E. COLBERT, J. C. TODD, GEORGE CARPENTER and GEORGE N. CHURCH,

Petitioners,

vs.

CHARLES H. HAMILL and WILLOUGHBY G. WALLING,

Respondents.

No. 147

BRIEF OF PETITIONERS

Opinion Below, 58 Fed. (2d) 41.

JURISDICTION.

This Court granted Application for Writ of Certiorari on the tenth day of October, 1932.

STATEMENT OF THE CASE.

The petitioners, Sam Hawks, J. F. McKeel and Lew Wentz, constitute the State Highway Commission of Oklahoma, and J. Berry King, is the duly elected, qualified and acting Attorney General of said State, all being officers of the Executive Department of the sovereign State of Oklahoma.

The remaining petitioners, J. R. Evatt, and others named in order, are county officers of McClain and Cleveland Counties, Oklahoma. The respondents, Charles H. Hamill and Willoughby G. Walling, are residents of the State of Illinois and claim to be the owners of a certain bridge structure located over the South Canadian River between the towns of Lexington, Cleveland County, Oklahoma, and Purcell, McClain County, Oklahoma.

The respondents filed their Bill of Complaint (R. 3-27) against the petitioners herein as defendants in the United States District Court for the Western District of Oklahoma, seeking an injunction against the petitioners herein and other persons from interfering with the respondents in the operation of the Purcell-Lexington Toll Bridge and the collection of tolls by respondents from all persons using said bridge.

The Bill contained the usual allegations as to diversity

of citizenship and amount in controversy. We will not enumerate the allegations of the Bill as the same are copied at length on pages 3 to 27, inclusive, of the record herein.

A temporary restraining order was issued by the trial court on May 15, 1931 (R. 27-28) and the case proceeded to trial thereafter on May 23, 1931.

The petitioners herein filed their separate motions to dismiss the Bill of Complaint (R. 31-33). These motions raised issues of law. The trial court sustained the motions of the petitioners to dismiss the case (R. 33-43). The respondents appealed from the decision of the trial court to the Circuit Court of Appeals of the Tenth Circuit, and said court on April 14, 1932, reversed the decree of dismissal with directions to the court below to issue the injunction prayed for in said Bill (R. 81-94).

Within the time prescribed by law, the petitioners filed their petition for a writ of certiorari in this Honorable Court, and on October 10, 1932, this Court granted such application. As a part of the petition for a writ of certiorari filed herein, we made a statement of the issues and cited certain cases which we think applicable and decisive of the questions involved herein. (Petition for Writ of Certiorari 2-14).

QUESTIONS PRESENTED.

Part 1

The law of Oklahoma, under which the Purcell-Lexington Toll Bridge Company was incorporated, is found in Sections 5366 to 5375, inclusive, Compiled Oklahoma Statutes, 1921. (See Appendix.)

The existence of a toll bridge corporation under such law is limited to twenty years from the time of the issuance of a charter thereof. The charter of the Bridge Company was issued by the Secretary of State on May 18, 1931. A Bridge Company may not operate a toll bridge after having received its charter unless it shall have received authority from the County Commissioners of the counties in which the bridge is to be located, authorizing the operation of the same under the provisions of Section 5367, *supra*.

It was contended by petitioners herein in the case below that even though the secondary franchises were granted to individuals, some of whom were the incorporators of the Purcell-Lexington Toll Bridge Company, just a few days prior to the filing of the Article of Incorporation, that such franchises taken by the said individuals as trustees for the corporation subsequently organized and that the duration of the secondary franchises were limited to twenty years from the date of the incorporation of the Bridge Company. It was

further contended by the petitioners in the court below that where franchises fix no period of duration, such period is limited to the life or existence of the grantee.

It was further contended by the petitioners that such secondary franchises could not be perpetual and that the same were inhibited by Section 32, Article 2 of the Constitution of the State of Oklahoma, as announced in the case of *The City of Okmulgee* v. *Okmulgee Gas Company*, 140 Okla. 88, 282 Pac. 640, by the Supreme Court of the State of Oklahoma.

It is, therefore, contended under this point that the secondary franchises, whether granted to individuals or to the Bridge Company, were limited as to duration and existence to a period of twenty years from the date of the issuance of the corporate charter of the Bridge Company, and that such secondary franchises were not perpetual.

Part 2.

The petitioners contended in the court below that such suit insofar as it related to the State Officers named as defendants, was a suit against the sovereign State of Oklahoma, and inhibited by the 11th Amendment to the Constitution of the United States.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals of the Tenth Circuit erred in holding that counties were not prohibited from granting to individuals and their assigns, perpetual rights to construct and maintain toll bridges.

2. Said court erred in holding that a corporation to which toll bridge franchises were transferred, was entitled to convey its franchise rights to individuals and that such rights were [illegible]ed in their duration to the life or term of the co[illegible]

[illegible]erred in holding that the franchises involved in [illegible]were perpetual, assignable and extended beyond [illegible]r lives of the grantees, whether corporate or individual. Said court erred in holding that the Legislature of Oklahoma in empowering counties to issue toll bridge franchises and counties in granting them, acted in discharge of proprietary or business, not governmental powers, so that the relations between them and grantees of such franchises were contractual.

4. Said court erred in construing the term "perpetuities" as used in Section 32, Article 2 of the Oklahoma Constitution as intended to limit the power to pass titles to realty vesting in futuro and is not equivalent to perpetual franchises.

5. The court erred in holding that the action against the Attorney General and State Highway Commissioners of Oklahoma in the instant case was not a suit against the sovereign State of Oklahoma.

SUMMARY OF ARGUMENT

Part 1

It is contended by the petitioners herein that the secondary franchises were not perpetual, but were limited in their duration to the corporate life or existence of the Purcell-Lexington Toll Bridge Company. That the corporate existence of said Bridge Company terminated on May 18, 1931, and that the bridge property and all rights connected therewith became public property disburdened of tolls on said date.

Part 2

The petitioners further contend that such suit insofar as it relates to the members of the State Highway Commission and the Attorney General of Oklahoma is inhibited by the 11th Amendment to the Constitution of the United States. That under said Amendment before the respondents herein could have instituted this suit, it was necessary to obtain the consent of the Legislature of the State of Oklahoma so to do.

ARGUMENT.

Part 1

The franchises involved in this case ran concurrent with the corporate existence of the Purcell-Lexington Toll Bridge Company and were limited in their duration to a period of twenty years from the expiration date of said corporation, to-wit, May 18, 1931.

The Bridge Corporation Act appears as Article 6, Chapter 35, Compiled Oklahoma Statutes, 1921. This Article consists of Sections 5366 to 5369, inclusive, Compiled Oklahoma Statutes, 1921. (See Appendix.)

Section 5369, *infra*, provides that the bridge must be kept in good condition. Section 5371, *infra*, provides the penalty for permitting the bridge to become in bad condition. Section 5372, *infra*, relates to the collection of tolls by toll gatherers. Section 5373,*infra*, fixes the penalty for forcibly passing over the bridge. Section 5374,*infra*, authorizes an annual report to the Board of County Commissioners, and Section 5375, *infra*, provides that the report required by said Section 5374 be published and fixes a penalty for non-compliance therewith.

The pleadings and evidence in this case (R. 3-71) show conclusively that Carter and his associates proceeded under

the provisions of Article 6, Chapter 34, *infra,* in the obtaining of the secondary franchise from the County Commissioners of said counties, and in securing the primary franchises (Corporate Charter) from the State of Oklahoma; and that Carter, an attorney, contemplated when he obtained the secondary franchise that he would form a corporation to construct and operate the toll bridge authorized thereby. (R. 63-67).

Carter adroitly sought to evade answering the question as to whether he proceeded under the Wagon Road Act (See Appendix) or Toll Bridge Corporation Act (R. 66—). His acts in connection therewith and the records concerning the same pleaded in the Bill of Complaint and shown in the evidence speak more forcibly than oral testimony. It will be observed by reading the grants secured by Carter, et al, from the County Commissioners of McClain County, Oklahoma, (R. 13-20) they followed the provisions of Section 5367, *infra,* part of the Bridge Corporation Article, and that the Commissioners granted said parties a right to construct, erect, maintain, and operate a toll bridge and collect tolls thereon across the South Canadian River; that said grant further provided that the bridge should be erected within the time provided by law, or said grant would be null and void; and that said bridge should be constructed across the South Canadian River, near Purcell, and extend across said river, and certain tolls were authorized to be charged for the use thereof. (See Appendix where said franchise is quoted at length).

The grant further provided that the toll should not be increased except as may now or hereafter be legally provided, but that the same might be reduced by said *Bridge Company* upon the posting of proper notices as provided by law. The grant and the terms employed therein was prepared by Carter (R. 64-67). A review of the same discloses that they were drawn to comply with said Sections 5366, 5367 and 5370, *infra*. The terms used were not loosely employed, but carefully couched in legal language to comply with the provisions of the sections just referred to.

Under the first paragraph of the grant, Carter was following the provisions of Section 5367, *infra*, which required authority of the County Commissioners of the County in which a part of the bridge was located before the bridge corporation could construct a toll bridge, or collect tolls thereon. The grant specifically states:

> "Said bridge to be erected within the time as provided by law, or else that authority is null and void."

The Cleveland County grant (R. 16-17), (See Appendix) is couched in the same language as the McClain County grant. This provision was to comply with Section 5368, *infra*, which provided that any bridge corporation ceases to be a body corporate unless within six months of the issuance of its certificate by the Secretary of State, it has obtained the legal

authority required by Section 5367, *infra.* Carter and his associates who obtained the secondary franchises as trustees for the bridge company to be formed, followed the provisions of Section 5366, *infra,* by designating the place where said bridge was to be constructed. The rate of tolls was fixed in said franchise as was authorized by Section 5367, *infra.*

The grants further provided in substance that the rate of tolls should not be increased, but might be reduced by the *Bridge Company* by posting notices as required by law. This requirement of the statute is provided in Section 5370, *infra.* As stated by the trial judge in his written opinion (R. 33-40), it is obvious from the grants that the grantees were not endeavoring to proceed under the Wagon Road Corporation Article, but that it was quite clear from the same that an effort was made to comply with the Toll Bridge Corporation Article. The intention of Mr. Carter and his associates to comply with the Toll Bridge Corporation Article is evidenced by the Article of Incorporation of the Purcell-Lexington Toll Bridge Company (R. 67-69), which is as follows:

> "First. That the name of this corporation shall be Purcell-Lexington Toll Bridge Company.
>
> "Second. That the purposes for which this corporation is formed are to erect, construct, build and maintain, or to lease or purchase and operate a toll bridge, and the approaches thereto, over and across the South Canadian

River at or near the City of Purcell, McClain County, Oklahoma to the East banks of said river into Cleveland County, Oklahoma, for the passage of footmen. passengers, cattle and vehicles of all kinds, and the wires for the transmission of electric currents for speech, light or power, and for pipes and mains for water and gas; and to collect and receive *tolls for such service; and* to lease or sell such rights over said bridge and the approaches thereto.

"Third. That the banks on the West side of said South Canadian River at, or near Purcell, McClain County, State of Oklahoma, on which said bridge is to be constructed, *is owned by said corporation,* and that on the East side of said river, to-wit, Cleveland County, Oklahoma, it is the purpose of said corporation to construct said bridge so as the same will have landing in public highway situated on the section line between sections six (6) and seven (7), township six (6) North, Range one (1) West, and *that said corporation has obtained in writing the consent of the Board of County Commissioners of Cleveland County for the erection of such bridge.*

* * * * * * * * *

"Fifth. That the terms for which the corporation is to exist is twenty (20) years."

These provisions are specifically required by Section 5366, *infra.* The Articles of Incorporation were subscribed to by three residents of Oklahoma. (Walling and Hamill be-

ing non-residents, and the law requires two-thirds of the incorporators to be residents of Oklahoma.)

In the Articles of Incorporation, the name of the stream over which the bridge was to be constructed and the place thereon is named and said Articles specifically state that the West end of the bridge is to be located at or near Purcell, Oklahoma, and *is owned by the corporation* and that the East end of the bridge located in Cleveland County was to be located in a public highway, *and that said corporation has obtained in writing the consent of the Board of County Commissioners,* and that the term of the existence thereof is to be twenty years. Comparing these provisions of the Articles of Incorporation with the requirements of Section 5366, *infra,* it will be seen that Carter, in preparing the same, followed the provisions of said section in the identical manner and order set forth therein. The Articles of Incorporation were certified by the Secetary of State on May 18, 1911. The McClain County secondary franchise is dated April 22, 1911, and the Cleveland County franchise is dated May 16, 1911. These instruments established the corrrectness of the opinion of the trial court in holding that the grants were taken by Carter, et al, for the benefit of the Toll Bridge Company, which such persons caused to be performed immediately after receiving said grants. (R. 13-17 and 67-69).

It is contended by the respondents herein that Carter and Halsell were granted the secondary franchise under the provisions of Article 18, Chapter 34, Compiled Oklahoma Statutes, 1921. (This Article is composed of Sections 5625 to 5636 inclusive, Compiled Oklahoma Statutes, 1921). (See Appendix). It is contended by respondents that said franchises were granted under the provisions of Sections 5627 and 5636, *infra*. By reading these sections it will be seen that the County Commissioners did not grant the franchises by reason of the authority therein contained. Especially is this true when we consider Sections 5625 and 5627, in their entirety. Section 5636, *infra*, makes the provisions of said Article 18, Chapter 34, *infra*, applicable to wagon, turn pike, and plank road, constructed, owned and operated by natural persons.

In the Bill filed by the respondents in this case it is not contended that Carter and his associates proceeded under the provisions of said Article 18, *infra*. They do not plead that said trustees followed in any manner the provisions of said Article 18, Chapter 34, *infra*, relative to the establishment of toll roads. The record discloses that none of the essential requirements of the Wagon Road Corporation Act were complied with by Carter and his associates. On the contrary, all the requirements of the Toll Bridge Corporation Article were complied with by said persons. If it be contended by the respondents that the fact that Carter, et al, secured the title

to the lands upon which the approaches or the West end of the bridge, were located in Purcell, Oklahoma, and that same was obtained for the purpose of laying out a proposed road under the provisions of the Wagon Road Act, we point out to the Court that not a single provision of said Act was complied with by said persons. On the contrary it is specifically stated in the Articles of Incorporation that the banks on the West side of the Canadian River on which the bridge is to be constructed is owned by said *Corporation.* This is a strict compliance with Section 5366, *infra,* a part of the toll Bridge Corporation Article. Said Article is further complied with in the Article of Incorporation, wherein it is stated that *said Corporation* has obtained in writing the consent of the Board of County Commissioners of Cleveland County for the erection of the bridge on a part of a public highway. This statement is in compliance with another requirement of said Section 5366, *infra.*

The facts in this case are as evidenced, by the Bill of Complaint, the exhibits thereto, the Articles of Incorporation referred to in the roads herein, and the testimony introduced, that it was not the intention of Carter and his associates to comply with the Wagon Road Corporation Article.

This position was never taken until after the Toll Bridge Company filed its suit against the Secretary of State of Ok-

lahoma in the District Court of Oklahoma County on June 7, 1929, in which it sought a return of mandamus to require the Secretary of State to cause an amended charter to be issued to the Purcell-Lexington Toll Bridge Company extending the time of its existence for a period of twenty years from the 23rd of March, 1929. Said case is reported in 148 Okla. 27, 296 Pac. 969. At the close of the hearing in the court below the trial judge (R. 22-40) made the observation that he was of the opinion that there was no authority within the statutes of the State of Oklahoma authorizing the granting of a perpetual franchise to individuals under the provisions of Article 6, Chapter 34, *infra;* and that when the charter of the corporation organized thereunder expired, the bridge and the road leading thereto having been dedicated to the public, reverted to the State disencumbered of any right to collect toll. Such was his holding in the written opinion(R. 33-40). From a consideration of Sections 5366 and 5367, *infra,* it is clear that the latter section is a limitation upon the power of the corporation created under the authority of Section 5366. Such corporation is not authorized to collect toll unless it obtains authority from the County Commissioners of the county where such bridge is located. This authority could not be extended by the County Commissioners beyond the life of the corporation. Only corporations chartered for a period of twenty years have authority to build and operate toll

bridges over the streams of the State of Oklahoma, under said Article 6, Chapter 34.

This position has received Legislative sanction by the expression of the Oklahoma Legislature as evidenced by Section 1, Chapter 257, Session Laws, 1929. (See Appendix). This statute was effective on June 10, 1929. The Legislature was conversant with the fact that the Purcell-Lexington Toll Bridge Company had brought the mandamus proceeding above referred to in the Supreme Court seeking to extend the corporate and franchise lofe of said company. The Act clearly establishes a legislative view to the effect that a toll bridge corporation cannot extend its corporate life or franchise rights beyond the period of the original corporate life.

The corporate existence of the Bridge Company being limited to twenty years, it is beyond the power and authority of the County Commissioners to authorize the collection of tolls by said corporation or its assigns for more than twenty years from the date of the issuance of the charter of the corporation. It, therefore, follows under the laws of the State of Oklahoma that a toll bridge corporation such as the Purcell-Lexington Company must not only have a charter, its primary franchise, but it must also have a secondary franchise granted by the Board of County Commissioners authorizing it to collect tolls.

Section 5367, *infra*, deals with the secondary franchises and contains a specific prohibition against the collection of tolls by a corporation organized thereunder until the secondary franchise is obtained.

It is well established in the State of Oklahoma, and other jurisdictions, that public officers have only such authority as is conferred upon them by law, and that such authority must be exercised in the manner prescribed by law.

National Surety Company v. *Sand Springs Bank*, 74, Okla. 176, 177 Pac. 574;

National Drill Mfg. Co. v. *Davis*, 29 Okla. 625, 120 Pac. 976;

Harlow v. *Board of Commissioners*, 33 Okla. 353, 125 Pac. 449;

Coyle v. *Board of Commissioners*, 38 Okla. 370, 132 Pac. 1113;

Dolezal v. *Bostick*, 41 Okla. 734, 139 Pac. 964;

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Board of Commissioners v. *Smith*, 47 Okla. 184, 148 Pac. 111.

News-Dispatch Ptg. & Audit Co. v. *Board of Commissioners*, 61 Okla. 259, 161 Pac. 207.

Assessment of First National Bank of El Reno, 64 Okla. 208, 166 Pac. 883;

Scott v. *Board of Commissioners*, 100 Okla. 77, 227 Pac. 448;

Allen v. *Board of County Commissioners of Pittsburgh County*, 28 Okla. 773, 116 Pac. 175.

The Supreme Court of Oklahoma held:

> "It is a settled rule of construction that the granting of power to a Board of County Commissioners must be strictly construed, and that such board, when acting under specific authority, must act strictly on the conditions under which the authority is given, and exercise only such powers as are especially granted, or as are incidentally necessary for the purpose of carrying into effect such powers."

This rule of law applies to the granting of franchises as is stated in 26 C. J., Section 47, page 1026, as follows:

> "The agent, or agency, to whom the power is delegated must keep within its, or his, restricted authority and a granting of a franchise is inoperative insofar as it may be in excess of the powers delegated. • • • "

See *Denver Railroad Company* v. *Denver City Railroad Company,* 2 Col. 673;

In *Knapp* v. *Supreme Commandery,* 118 S. W. 390, the Supreme Court of Tennessee held:

> "All statutes under which corporate power is asserted must be construed in favor of the State from which the power emanated, and against the grant of power."

In *Chicago, Rock Island & Pac. Ry. Co.* v. *Taylor,* 79 Okla. 142, 192 Pac. 349, the Supreme Court of Oklahoma in the 8th syllabus, sub-division 2, held:

"That franchises and rights-of-way granted by the public are to be construed strictly against the grantee and liberally in favor of the public."

The granting of the secondary franchise required by Section 5367, *infra,* has been delegated to the Board of County Commissioners. Section 5366, *supra,* contains a specific prohibition that no toll bridge corporation shall exist for a longer period than twenty years. It is therefore quite apparent that the County Commissioners have power only to grant a secondary franchise to a company originally incorporated, and that such secondary franchise may not exist longer than twenty years. No authority of any kind or character is given the Board of County Commissioners to in any way extend or renew the secondary franchise, and this not having been expressly granted, such board is without authority to in any way extend the life or term of the original secondary franchise. Therefore, the secondary franchise obtained by Carter and Halsell, as trustees for the Bridge Company, expired at the same time the original charter expired, to-wit, May 18, 1931.

The respondents contend that the case of *Postal Bridge Company* v. *State, ex rel. Dabney,* 139 Okla. 225, 282 Pac. 462, holds that the granting of a franchise to operate a toll bridge is not limited to a toll bridge corporation organized pursuant to Section 5366, *infra.*

We desire to call the Court's attention to the fact that the Supreme Court of Oklahoma in said case had before it a secondary franchise issued by a Board of County Commissioners to construct a toll bridge and collect tolls thereon. At page 464 of the cited volume, the court used the following language:

> "The franchise is a grant from the State as compensation for the building of the bridge, and if there was no valid franchise there could not be a valid dedication."

And at page 464 of the same volume the court held:

> "So the contract of the DeLuxe Bridge Company with the State of Oklahoma was for the building, dedication and maintaining of this bridge and the consideration was the right to collect tolls for the period specified in the franchise as limited by the statutes of the State of Oklahoma."

This case clearly holds that the Board of County Commissioners is without authority to extend the secondary franchise owned by the Bridge Company because there would be no consideration therefor. The court in said case merely held that a toll bridge might be operated under the law authorizing wagon road corporations where the bridge was a part of the wagon road, and connected parts of the same.

It did not hold that individuals, or firms, could operate

and maintain a toll bridge erected by a Toll Bridge Corporation organized under the provisions of Section 5366, *infra*, nor did it hold that a Bridge Company organized under the provisions of said Article could legally convey a right to its assigns to operate a bridge perpetually, or beyond the corporate life of such Bridge Corporation.

The franchise granted the DeLuxe Company, a corporation organized under the provisions of Section 5366, *infra*, had not expired by its own limitations when the same was assigned to the Postal Bridge Company.

In the instant case the secondary franchise expired shortly after the corporation sought to transfer the title to said bridge and its properties to the individual members, who constituted the directors of said corporation.

The court in the Postal Bridge case held that the franchise acquired by the DeLuxe Company could be assigned to the Postal Company subject to the limitations imposed in the secondary franchise. Sections 2 and 3 of the syllabus, are in order as follows:

> "A corporation having a franchise to operate a toll bridge may sell and assign said franchise to an express trust but, the express trust or assignee takes said franchise subject to the same expiration period, and is bound to discharge the same duties, and is liable to the same regulations, penalties, and forfeiture as before such sale.

"Where said assignee has complied with all the provisions of the franchise and said franchise has not expired, an injunction will not lie to enjoin collection of toll charges."

Said case is, therefore, not an authority for the contention of the respondents that the franchise was granted to individuals under the provisions of the Article known as the Wagon Road Corporation Article.

It was stated in the opinion in the Postal Bridge case that the DeLuxe Company was organized under the provisions of Section 5366, *infra,* and it was admitted that the franchise period authorized by the Articles of Incorporation of the DeLuxe Company had not expired. The court properly held, in our judgment, that until that term expired such right could be transferred to any person, firm or corporation and enjoyed until the same expired by its own limitations.

The opinion held in effect that such persons, firm or corporation, would have no authority to operate the bridge and collect tolls thereon until after the expiration of the corporate period of the DeLuxe Company.

Inasmuch as the primary and secondary franchises of the Purcell-Lexington Toll Bridge Company have expired and the bridge structure involved in this case has become public property disencumbered of tolls the State officers who are now

the petitioners herein, would have been derelict in their duty if they had attempted to acquire the property under the provisions of Chapter 256, Session Laws 1929, which authorizes the acquiring of toll bridges by the State Highway Commission. Had the Highway Commission sought to expend public funds of Oklahoma in purchasing the same, it could and should have been enjoined from so doing. Likewise it is not necessary for the Legislature to exercise the power conferred upon it by Section 47, Article 9 of the Constitution of Oklahoma relative to altering, amending, cancelling, revoking, and repealing corporations and franchises, as both the primary franchise and the secondary franchise in the instant case have expired.

This position is further sustained in the case of the *City of Okmulgee* v. *Okmulgee Gas Company*, 140 Okla. 88, 282 Pac. 640. The rule is stated in the first paragraph of the syllabus as follows:

> "Chapter 102, Session Acts of the Tenth Legislature of Oklahoma, 1925, commonly known as House Bill No. 4, being an Act relating to the business of furnishing power, light, heat, gas, electricity or water in cities and towns, authorizing the surrender of municipal franchises in exchange for revocable permits, requiring certificates of convenience and necessity, and providing for the determination and issuance thereof, and repealing Acts in conflict therewith, by its terms authorizing any person, firm, association, or corporation, now or hereafter engaging in the business of furnishing power, light, heat,

gas, electricity, or water as a public utility in any city or town in this State under a municipal franchise now in existence or hereafter granted at any time before the expiration of such franchise but not thereafter, to file with the clerk of the municipal corporation which granted such franchise and with the Corporation Commission of the State of Oklahoma a written declaration and agreement issued in the manner required for the execution of conveyances of real estate, that it surrender such municipal franchise for the purposes mentioned in said Act, and, in consideration, the utility surrendering the same shall, by operation of law, receive in lieu of such surrendered franchise a permit from the state revocable only by the Legislature of Oklahoma whenever in its opinion such permit may be injurious to the citizens of this state, in such manner, however, that no injustice shall be done to the holder of such permit, in effect authorizes the converting of a limited franchise into a perpetual franchise, *and therefore violates Section* 32 *of Article* 2 *of the Constitution, which declares that perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed.*"

We maintain that Judge Lewis reached the wrong conclusion when he held that the perpetuity clause of the Oklahoma State Constitution (Section 32, Article 2) was not applicable to the secondary franchise involved in this case. This position is sustained by the City of Okmulgee case, *supra.*

It was observed by Judge Swindall who wrote the opinion, 282 Pac. 651, that "Any Act of the Legislature which pro-

vides for issuing a license, revocable permit, indeterminate permit, or other instrument in the nature of a franchise which is not limited as to its life or existence, violates Section 32 of Article 2 of our Constitution."

It will be contended by the respondents that the City of Okmulgee case does not apply as the court was then dealing with franchises granted by municipalities to public utilities, and that the opinion of the Oklahoma Supreme Court in said case, insofar as it refers to Section 32, Article 2, *supra,* is *dicta.* We do not believe such contention is correct.

This position was taken by the Supreme Court, as is evidenced by the language used by Judge Lester in a concurring opinion in the City of Okmulgee case, which appears in 282 Pac. 653, and is as follows:

> "It is contended by the defendants that the rights of the municipalities are limited in their privilege to grant franchises, and that this right may be withdrawn by the Legislature at its will and that acting under the sovereignty of the State and by virtue of Section 47, Article 9, which reads 'The Legislature shall have power to alter, amend, annul, revoke or repeal any charter of incorporation or franchise now existing and subject to be altered amended, annulled, revoked or repealed at the time of the adoption of this Constitution, or any that may be hereafter created. Whenever in its opinion it may be an injustice to the citizens of this State in such manner, how-

ever, that no injustice may be done to the incorporators' * * * the Legislature was acting within prescribed bounds in passing House Bill 4. *If the reader will turn to Section* 1, *Article* 9, *it will be discovered that the municipal corporations are excluded from the definitions of corporations or companies, and that Article* 9 *deals mainly with the creation of and the regulation of corporations and stock companies and it will be further observed that Section* 47, *Article* 9, *has reference to the primary charter or franchise of incorporation and has no reference to secondary franchises procured by corporations from the State, or municipalities.*"

This language clearly indicates that the Supreme Court had under consideration said Section 47 of Article 9, as applied to secondary franchises and specifically held that the same did not apply thereto, but that it was only the primary charter or franchise of a corporation which could be revoked, *et cetera,* under this provision of the Constitution.

This rule of law has been sustained by the Supreme Court of Oklahoma in the following cases:

City of Okmulgee v. *Okmulgee Gas Company,* 141 Okla. 98, 284 Pac. 70;

City of Hugo v. *Oklahoma Power Company,* 141 Okla. 100, 284 Pac. 12;

City of Cushing v. *Consolidated Gas Utilies Company,* 141 Okla. 82, 284 Pac. 38;

In re Application of Consolidated Gas Utilities Company for revocable permit under Chapter 102, Session Laws 1925, relative to the *Town of*

Tonkawa, Oklahoma, No. 20766, Supreme Court of Oklahoma (*not yet reported*).

These cases adopt the following rule of law announced in the case of *Cedar Rapids Water Company* v. *City of Cedar Rapids,* 118 Iowa 234, 91 N. W. 1081, to-wit

> "Grants of franchise in perpetuity or for unreasonable long periods of time are generally regarded as against public policy and, if ever valid, the authority therefor must be found in the Constitution and statutes of the State."

See also the following cases sustaining the views announced in said cases:

Richmond County Gaslight Co. v. *Town of Middleton,* 51 N. Y. 228;
City of Brenham v. *Brenham Water Co.,* 67 Tex. 542, 4 S. W. 143;
Long v. *City of Duluth,* 49 Minn. 280, 59 N. W. 913, 32 Am. St. Rep. 547,
Thrift v. *Elizabeth City,* 122 N. C. 31, 30 S. E. 349.

It, therefore, follows that the contentions of the respondents that the secondary franchises are perpetual cannot be sustained by any constitutional or statutory authority of the State of Oklahoma.

It is not contended by the petitioners herein that the secondary franchises granted to Carter and Halsell, as the trus-

tees of the Purcell-Lexington Toll Bridge Company, were void, but they contend that such franchises were granted to Carter and Halsell specifically for the Purcell-Lexington Toll Bridge Company, and that they as such trustees held the same for such Bridge Company. Such contention was sustained by the trial court.

We only desire to state that this contention is answered by the case of City of Okmulgee, etc., *supra.* This case cites Section 32, Article 2, of the Constitution of Oklahoma, which prohibits perpetuites and monopolies, and is as follows:

> "Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed, nor shall the law of primogeniture or entailments ever be in force in this State."

Such petition is further sustained by the Cedar Rapids case, *supra.*

The law is well established in the State of Oklahoma that at the expiration of the franchise to take tolls by a toll bridge company, or individuals, that the bridge property becomes the property of the State.

See case of *Grove Bridge Co., et al,* v. *State, ex rel. Hampton, et al,* 133 Okla. 115, 271 Pac. 846.

The first case announcing this rule is that of *State ex rel,*

etc., v. *Lawrence Bridge Co.*, 22 Kan. 438. Mr. Justice Brewer, speaking for the court, at page 463 of said report, stated the law as follows:

> "For I agree with the Chief Justice that the bridge is a permanent structure on the public highway and under the authorities, when the franchise to take tolls ceases, the right of the public to use the bridge free from any burden of tolls attaches without any right on the part of the builders to remove the structure and destroy the highway. The right to take tolls for a specific number of years is the consideration granted by the public to the defendants for the privilege of placing this improvement on the highway, and the former owners have now no more right to remove the bridge than the owner of a turnpike to tear up after the franchise to take tolls has ceased."

This rule of law has been sustained in the following cases:

Virginia Canon Toll Road Co. v. *People*, 45 Pac. 398;
State, ex rel, v. *Scott County Road Co.*, 105 S. W. 752;
Rockwith v. *State Road and Bridge Co.* 108 N. W. 785;
People, ex rel, v. *Anderson and U. Valley Road Company*, 18 Pac. 308;
Grand Rapids Bridge Co. v. *Prange*, 35 Mich. 404.

There is not a decision of any court to the contrary.

Before presenting argument under Part 2, of this brief, we desire to call attention to the opinion of Judge Lewis of

the Supreme Court in which he states that under the provisions of Section 10,104, Compiled Oklahoma Statutes, 1921, it is indicated that the secondary franchises in the first instance may be issued to individuals. However, it will be observed by reading the same that such life may be enjoyed only by persons or corporations in the construction and operation of toll bridges over boundary lines between this and other states. Therefore, such statute is not a basis for the holding that the franchises in the instant case could legally be granted to individuals or that the same extended for a period in excess of the corporate life of the Purcell-Lexington Toll Bridge Company.

It is also stated in the opinion by Judge Lewis that Section 10,076, Compiled Oklahoma Statutes, 1921, authorizes the purchase or condemnation of the rights of persons and corporations in toll bridges. This statute was enacted in 1911 and authorizes the County Commissioners to acquire, either by purchase or condemnation, toll bridges and all rights and properties in connection therewith. This law was enacted before the enactment of Chapter 48, Session Laws, 1923-24, which classifies highways in the State of Oklahoma into three classes, to-wit: State highways, county highways and township roads. Under the provisions of said Chapter 48, *supra,* the State Highway Commission would be authorized to purchase a toll bridge on a State Highway where the rights of

said bridge company had not expired by limitation. The counties involved in this litigation could not purchase the same. The rights having expired as heretofore suggested, the State Highway Commission would have no authority to acquire the same as any funds paid therefor would constitute a gratuity and such is inhibited by Section 15 of Article 10 of the State Constitution.

Part 2

This in an action against the State of Oklahoma and cannot be maintained without the State's consent granted by direct legislative enactment. Neither the executive nor judicial branch can waive the State's immunity from suit.

There being no legislative enactments consenting for the State to be sued, its immunity from suit is thoroughly settled by Oklahoma decisions. Thus in *National Surety Co.* v. *State Banking Board*, 49 Okla. 184, 152 Pac. 389, Chief Justice Kane said:

> "It is a long established and well recognized principle of sovereignty that the State cannot be sued without its consent, granted by direct legislative enactment."

This rule of law has been established in the following cases:

> *State Banking Board* v. *Oklahoma Bankers Trust Company*, 63 Okla. 260, 145 Pac. 767;

Lankford v. *Schroeder*, 47 Okla. 279, 147 Pac. 1049;
State Banking Board v. *Oklahoma Bankers Trust Company*, 49 Okla. 72, 151 Pac. 586;
Lankford v. *Platt Iron Works Company*, 235 U. S. 461, 59 L. ed. 316;
Love v. *Filtsch*, 33 Okla. 131, 124 Pac. 30.

This rule of law has been established in other jurisdictions in the following cases:

Eidenmiller v. *State*, 233 N. W. 447;
Hampton v. *State Board of Education*, 42 A. L. R. 1456 (Fla.);
Stanley v. *Schwalby*, 162 U. S. 255, 40 L. ed. 976;
McDowell v. *Fuller*, 169 Mich. 332, 135 N. W. 267;
Ayers v. *Board of Trustees*, 98 So. 847-850;
Mississippi Centennial Exposition Company v. *Luderbach*, 123 Miss. 828, 86 So. 517;
Morrah v. *Dr. John De La Howe Industrial School*, 113 S. E. 70;
Ex parte Ayers, 123 U. S. 443, 31 L. ed. 216.

In *Hampton* v. *State Board of Education*, 42 A. L. R. 1456, the Florida Supreme Court said: "The Legislature is the proper body to authorize suits against the State."

In *Ayers* v. *Board of Trustees*, 98 So. 487, the Mississippi Supreme Court said: "Only the Legislature can surrender this privilege of the sovereign State and its governmental subdivisions or agencies."

In the case of *Mississippi Centennial Exposition Co.* v. *Luderbach, supra,* the Mississippi Supreme Court said, "It is final learning that the State and its subdivisions and agencies are not subject to suit unless made so by statute; and the statute, where a statute exists, is the measure of the power to sue such board or agency."

In *Morrah* v. *Dr. John De La Howe Industrial School,* 113 S. E. 70, the South Carolina Supreme Court said: "The State can be sued only by permission granted; that permission can be granted only by the general assembly; the effect of making the state a party would have been necessarily a judicial consent, upon the motion of the Attorney General, who has not the power to move for or consent to such suit."

In *Stanley* v. *Schwalby,* 162 U. S. 255, 40 L. ed. 960, quoted and followed by the Oklahoma Supreme Court in *National Surety Company* v. *State Banking Board, supra,* Mr. Justice Gray, speaking for a unanimous court, said: "It is a fundamental principle of public law, affirmed by a long series of decisions of this court, and clearly recognized in its former opinions in this case, that no suit can be maintained against the United States or against their property, in any court, without express authority of Congress * * *."

This brings on for consideration the following propositions:

(a) The Oklahoma State Highway Commissioners are executive officers and exercising part of the executive powers of the State.

Section 1 of Article 16 of the Oklahoma Constitution declares that "the Legislature is directed to establish a Department of Highways and shall have power to create improvement districts and provide for building and maintaining public roads and may provide for the utilization of convict and punitive labor thereon."

Pursuant to this constitutional mandate the present State Highway Commission was created by the provisions of Section 1, Chapter 68, Session Laws of 1929, and their statutory powers and duties are set forth in Chapter 48, Session Laws 1923-24, and Chapter 82, Session Laws 1927, as amended by the provisions of Chapter 245, Session Laws 1929. Paragraph (a) of Chapter 48, *supra,* provides:

> "(a) Have supervision of the highways and bridges which are constructed, improved or maintained in whole or in part by the aid of State monies and State highways constructed in whole or in part by the aid of monies appropriated by the United States Government, insofar as such supervision is consistent with the Acts of Congress relating thereto."

(b) The State Highway Commission is an agency of the State and a part of the executive branch thereof.

The Supreme Court of Oklahoma, in the case of *Wentz et al.* v. *Ingenthron et al.*, 146 Okla. 165, 294 Pac. 154, held that the State Highway Commission was a part of the executive branch of the government of the State of Oklahima, and that said court had no power or jurisdiction to interfere with the State Highway Commission as a part of the executive branch of the State government, so long as it acted within the law.

This principle of law was reaffirmed in the case of *Wentz* v. *Board of County Commissioners of Lincoln County, Oklahoma*, 147 Okla. 173, 295 Pac. 599.

The latest expressions of the Supreme Court of Oklahoma upon the rule announced in *Wentz* v. *Ingenthron, supra*, are found in the cases of *Wentz et al.* v. *Dawson et al.*, 149 Okla. 94, 299 Pac. 493, and *Hawks et al.* v. *Seay et al.*, 150 Okla. 160, 1 Pac. (2d) 148. All of the highway cases referred to herein, decided by the Supreme Court of Oklahoma, have held that the Highway Commission is an executive branch of the State of Oklahoma, and that it cannot be sued without specific legislative consent.

In the case of *Poindexter* v. *Greenhow*, 114 U. S. 270, 29 L. ed. 185, Justice Mathews said:

> "The State is a political corporate body and can act only through agents and can command only by laws."

In *Long* v. *Highway Commission of Iowa,* 213 N. W. 532, the Supreme Court of Iowa said:

> "The State Highway Commission, or agents of the State, acting for and in behalf of the State, within the powers conferred upon them by the statute. This action is an attempt by an injunction to control the manner in which the said agents of the State shall exercise the authority vested in them."

Obviously, the State can act only through its agents—that is, its officers and official representatives. The State is an intangible entity, a concept. See *Eidenmiller* v. *State, supra; Moehler* v. *Fish Commission of Oregon,* 276 Pac. 691.

(c) The court will look through and beyond the nominal parties to this action and determine who is the real party in interest, and although the State is not specifically named party defendant, nevertheless, if it appears that the State is the real party in interest and will be affected by the judgment, the suit will be dismissed for want of an indispensable party.

The first paragraph of the syllabus in *Salem Flouring Mills Co.* v. *Lord,* 42 Ore. 82, 69 Pac. 1033, says:

> "When the jurisdiction of the court is questioned on the ground that the action is really against the State, the court will look behind the nominal parties to the controversy, dismissing the action if it is really against the State, and retaining jurisdiction if not."

To the same effect see *State ex rel. Shafer* v. *Lowe,* 210 N. W. 501 (N. D.); *Hagood* v. *Southern et al.,* 117 U. S. 52 29 L. ed. 805; *Ex parte Ayers,* 123 U. S. 443, 31 L. ed. 216; 36 Cyc 915.

In *Love* v. *Filtsch,* 33 Okla. 131, 124 Pac. 30, the Oklahoma Supreme Court in a unanimous opinion holding that an action against officers of the State was in effect an action against the State although the State was not nominally a party, said:

> "While it is true that the State, in the case at bar, is not a party defendant as such, still, as was said by Justie Lamar in the case of *Pennoyer, et al,* v. *McConnaughy,* 140 U. S. 1, 35 L. ed. 363, it is well said that a suit against the officers of the State to compel them to do the acts which constitute a performance by it of its contracts is in effect, a suit against the State itself."

(d) The Attorney General of Oklahoma is an executive officer of the State and the chief law officer thereof. It is his duty to represent the State Highway Commission in all legal proceedings.

Section 1 of Article 6 of the Oklahoma Constitution declares that:

> "The executive authority of the State shall be vested in the Governor, Lieutenant Governor, Secretary of State, State Auditor, Attorney General, * * * , each of

whom shall keep his office and public records, books and papers at the seat of government, and shall perform such duties as may be designated in this Constitution, or prescribed by law."

Under the provisions of Section 8, Compiled Oklahoma Statutes 1921, it is the duty of the Attorney General to appear for the State and prosecute and defend all actions and proceedings in the Supreme Court and Criminal Court of Appeals in which the State shall be interested as a party, and shall also, when requested by the Governor, or either branch of the Legislature, appear for the State and prosecute or defend in any court or before any officer in any cause or matter, civil or criminal, in which the State may be a party or interested.

Under the provisions of Section 7, Chapter 18, Session Laws of Oklahoma 1923-24, it is the duty of the Attorney General, upon the direction of the Governor, or the request of the State Highway Commission, to act as legal advisor of the Commission and appear for and assist the Commission in any proceedings in any of the courts of the State in which the State is a party.

Since the Constitution of the State of Oklahoma provides that the Attorney General is an executive officer, we assume it will not be necessary for us to cite authorities to

this effect. Inasmuch as the statutes referred to prescribing the duties of the Attorney General in connection with the State Highway Commission are plain and unambiguous, we take it that such statutes are controlling.

(c) The object of this suit is to preclude the individual members of the State Highway Commission of the State of Oklahoma, and the Attorney General thereof, from performing those duties specifically enjoined upon them as executive officers of the State of Oklahoma. It seeks to preclude them from enforcing a contract made and entered into by the State of Oklahoma and the Purcell-Lexington Toll Bridge Company. An action against such officers to prevent the discharge of their official duties is an action against the State and cannot be maintained.

It has been directly and positively settled by the Supreme Court of the United States in three or four decisions in which it has laid down the rule that an action against the officers of the State to prevent them from doing things, operating as a breach of the State's contract, is an action against the State on the contract. Certainly, if an action may not be prosecuted against the State for a breach of its contract, it follows that no action could be brought against it from enforcing the provisions of contracts made with it and from enforcing the plain provisions of the statutes thereof.

The members of the State Highway Commission, and the Attorney General, in the event they should bring the suit suggested by the complainants in their bill, would only be act-

ing as officers of the State of Oklahoma representing such State in action, and although the State is not made a party to the present case, it is the real party against which relief is sought and in which a judgment for the complainants, although nominally against the defendants as individuals, would operate to control the action of the State, and is therefore, a suit against the State.

The Supreme Court of the United States in the case of *Ex parte Ayers, supra,* drew the distinction between actions permissible against officers of the State as individuals and actions against them where the result operates against the State instead of the individuals. The Court said:

> "The relief sought is against the defendants, not in their individual, but in their representative capacities as officers of the State of Virginia. The acts sought to be restrained are the bringing of the suits by the State of Virginia in its own name and for its own use. If the State had been made a defendant to this bill by name, charged according to the allegations it now contains—supposing that such a suit could be maintained — it would have been subjected to the jurisdiction of the court by process served upon its Governor and Attorney General, according to the precedents in such cases. *New Jersey* v. *New York,* 30 U. S. 5 Pet. 284, 288. 290 (8:127, 128, 129); *Kentucky* v. *Dennison,* 65 U. S. 24 How. 66, 96, 97 (16:717, 725); Rule 5 of 1884, 108 U. S. 574 (see Bk. 20:901). If a decree could have been ren-

dered enjoining the State from bringing suit against its taxpayers, it would have *operated upon the State only through the officers who by law were required to represent it in bringing such suits,* viz, the present defendants, its Attorney General, and the Commonwealth's attorneys for the several counties. * * *

"The nature of the case as supposed is identical with that of the case as actually presented in the bill, with the single exception that the State is not named as a defendant. How else can the State be forbidden by judicial process to bring actions in its name, except by constraining the conduct of its officers, its attorneys, and its agents? And if all such officers, attorneys and agents are personally subjected to the process of the court, so as to forbid their acting in its behalf, how can it be said that the State itself is not subjected to the jurisdiction of the court as an actual and real defendant * * *?

"The present case stands upon a footing altogether different. Admitting all that is claimed on the part of the complainants as to the breach of its contract on the part of the State of Virginia by the Acts of its General Assembly referred to in the bill of romplaint, there is nevertheless no foundation in law for the relief asked. For a breach of its contract by the State, it is conceded there is no remedy by suit against the State itself. This results from the 11th Amendment to the Constitution, which secures to the State immunity from suit by individual citizens of other states or aliens. *This immunity includes not only direct actions for damages for the breach of the contract brought against the State by name, but all other actions and suits against it, whether*

in law or in equity. A bill in equity for the specific performance of the contract against the State by name, it is admitted, could not be brought. In *Hagood* v. *Southern,* 117 U. S. 52 (29:805), it was decided that in such a bill, where the *State was not nominally a party* to the record, brought against its officers and agents, having no personal interest in the subject matter of the suit, and defending only as representing the State, where '*The things required by the decree to be done and performed by them are the very things which, when done and performed, constitute a performance of the alleged contract by the State' the court was without jurisdiction, because it was a suit against a State.*

"The converse of that proposition must be equally true, because it is contained in it; that is, a bill, the object of which *is by injunction, indirectly, to compel the specific performance of the contract,* by forbidding all those acts and doings which constitute breaches of the contract, and must, also, necessarily, be a suit against the State. In such a case, though the State be not nominally a party on the record, if the defendants are its officers and agents, *through whom alone it can act in doing and refusing to do the things which constitute a breach of its contract,* the suit is still, in substance, though not in form, a suit against the State. Such is the precise character of the suit in the circuit court against the petitioners in which the order was made, the violation of which constitutes the contempt for which they have been committed to the imprisonment from which they seek delivery by these writs.

"It may be asked what is the true ground of distinction, so far as the protection of the Constitution of

the United States is invoked, *between the contract rights of the complainant in such a suit, and other rights of person and of property?* In these latter cases it is said that jurisdiction may be exercised against individual defendants, notwithstanding the official character of their acts, while in cases of the former description the jurisdiction is denied.

"The distinction, however, is *obvious.* The acts alleged in the bill as threatened by the defendants, the present petitioners are violations of the assumed contract between the State of Virginia and the complainants, only as they are considered to be the acts of the State of Virginia. The defendants, as individuals, not being parties to that contract, are not capable in law of committing a breach of it. *There is no remedy for a breach of a contract, actual or apprehended,* except upon the contract itself, and between those who are by law parties to it. In a certain sense and in certain ways the Constitution of the United States protects contracts against laws of a State subsequently passed impairing their obligation, and this provision is recognized as extending to contracts between an individual and a State; but this, as is apparent, is subject to the other constitutional principle, of equal authority, contained in the 11th amendment, which secures to the State an immunity from suit. Wherever the question arises in a litigation between individuals, which does not involve a suit against a State, the contract will be judicially recognized as of binding force, notwithstanding any subsequent law of the State impairing its obligation. But this right is incidental to the judicial proceeding, in the course of which the question concerning it arises. It is not a

positive and substantive right of an absolute character, secured by the Constitution of the United States against every possible infraction, or for which redress is given as against strangers to the contract itself, for the injurious consequences of acts done or omitted by them. Accordingly, it was held in *Carter* v. *Greenhow*, 114 U. S. 317 (29:202), that no direct action for the denial of the right secured by a contract, other than upon the contract itself would lie under any provisions of the Statutes of the United States authorizing actions to redress the deprivation, under color of state law, of any right, privilege, or immunity secured by the Constitution of the United States. In that case it was said, page 322 (204); 'How, and in what sense, are these rights secured to him by the Constitution of the United States? The answer is, by the provision of Article I, Section 10, which forbids any State to pass laws impairing the obligation of contracts. That constitutional provision, so far as it can be said to confer upon or secure to any person any individual rights, does so only indirectly and incidentally. It forbids the passage by the States of laws such as are described. If any such are, nevertheless, passed by the Legislature of a State, they are unconstitutional and void. In any judicial proceeding necessary to vindicate his rights under a contract affected by such legislation, the individual has a right to have a judicial determination declaring the nullity of the attempt to impair its obligation. This is the only right secured to him by that clause of the Constitution'. *But where the contract is between the individual and the State, no action will lie against the State,* and any action founded upon it *against defendants* who are officers of the State, the object of which is to enforce

its specific performance by *compelling those things to be done by the defendants which, when done, would constitute a performance by the State, or to forbid the doing of those things which, if done, would be merely breaches of the contracts by the State, is in substance a suit against the State itself, and equally within the prohibition of the Constitution.*

"It cannot be doubted that the 11th amendment to the Constitution operates to create an important distinction between contracts of a State with individuals and contracts between individual parties. In the case of contracts between individuals, the remedies for their enforcement or breach, in existence at the time they were entered into, are a part of the agreement itself, and constitute a substantial part of the obligation. *Louisiana* v. *New Orleans,* 102 U. S. 203 (26:132). That obligation, by virtue of the provision of Article I, Section 10, of the Constitution of the United States, cannot be impaired by any subsequent state legislation. Thus, not only the covenants and conditions of the contract are preserved but, also the substance of the original remedies for its enforcement. *It is different with contracts between individuals and a State.* In respect to these, by virtue of the 11th amendment to the Constitution, there being no remedy by a suit against the State, *the contract is substantially without sanction, except that which arises out of the honor and good faith of the State itself, and these are not subject to coercion.* Although the State may, at the inception of the contract, have consented as one of its conditions to subject itself to suit, it may subsequently withdraw that consent and *resume its original immunity* without any violation of the obligation of its contract in the constitutional sense.

Beers v. *Arkansas*, 61 U. S. 20 How. 52 (15:991); *Memphis & C. R. R. Co.* v. *Tennessee*, 101 U. S. 337 (25:960)."

A very interesting case upon what constitutes a suit against the State when brought against the individual officers thereof, is that of *Hampton* v. *State Board of Education*, 42 A. L. R. 1456, which states the exceptions to the rule that the State and its agencies are immune from suit. If there could be any doubt about this suit being an action against the State, it ought to be removed by the decision of the United States Supreme Court in *State Highway Commission of Wyoming* v. *Utah Construction Co.*, 278 U. S. 194, 73 L. ed. 262. That case involved an action against the Wyoming State Highway Commission. The Wyoming Highway Act originally provided that "the Commission shall have the power to sue in the name of the State Highway Commission of Wyoming, and may be sued by such name and in court upon any contract executed by it." Thus, the State had consented to be sued in the State courts, but the question was whether or not the suit against the Highway Commission could be maintained in the Federal court, and that turned on the question as to whether or not there was a diversity of citizenship. The original Act provided that the costs of roads should be paid from the State Highway fund and that the construction and maintenance of all State highways, "including bridges and culverts thereon, shall be per-

formed at the expense of the State and by and under the supervision of the Commission and State Highway Superintendent."

The action was for a breach of contract for the construction of a highway entered into between the Highway Commission, acting for the State, and the plaintiff. Plaintig filed an amended petition, naming the Wyoming State Highway Commission, and its individual members, as defendants, and sought to recover damages arising out of the breach of the construction contract as supplemental. The plaintiff's petition alleged that the plaintiff was a citizen of Utah and the Commission and its individual members were citizens of Wyoming. The Court held, however, that the suit was really against the State, *that the State was not a citizen,* and that there was no jurisdiction of the Federal court. The Court said:

> "It seems to us sufficiently clear that the suit is, in effect, against the State of Wyoming. The contract for the construction of the work in question was between the Utah Construction Company and the State. The State, acting through the Highway Commission, as it might through any officer, became a party to the original agreement and obligated herself thereby. Neither the Commission nor any of its members assumed any direct or personal responsibility. The Commission was but the arm or *alter ego* of the State, with no fund or ability to respond in damages."

The trial court did not pass upon that portion of the motion of the defendants, Hawks et al., as members of the State Highway Commission, and King, Attorney General, which urged dismissal on the ground that the suit was an attempt to sue the State of Oklahoma. If we are right in our contention that said action is a suit against the State, the motion on such ground involves the question of jurisdiction, and as we understand, such question may be raised at any time in the proceeding. We respectfully urge that under the Eleventh Amendment to the Constitution of the United States and the cases cited under the title of Point 1, in this brief, that the motion of the defendants, Hawks et al., as members of and constituting the State Highway Commission of the State of Oklahoma, should have been sustained by the trial court, and that this Court should now enter an order sustaining the same and dismiss this cause as to the defendants, Hawks et al., as members of the State Highway Commission, and King, Attorney General.

CONCLUSION

In conclusion we most respectfully urge that the trial court properly held that the franchises to take toll on the Purcell-Lexington Toll Bridge had expired on the date of the trial of the case in the court below; and that the Boards of County Commissioners of McClain and Cleveland Counties, Oklahoma, could not grant toll franchises for more than twenty years under the provisions of Sections 5366 and 5367, Compiled Oklahoma Statutes, 1921; and that the grants to Carter, and others, were to them as trustees for the Purcell-Lexington Toll Bridge Company; that the bridge property involved had become the property of the State of Oklahoma and that the public was entitled to use the same without fee and that said court correctly dismissed the Bill of Complaint filed by the appellants.

It is further respectfully urged that the Honorable Circuit Court of Appeals erred in ordering and decreeing that the decree of the District Court for the Western District of Oklahoma be reversed with the direction that the injunction prayed for in the Bill be granted.

We also respectfully urge that the Circuit Court of Appeals erred in holding that said suit insofar as it pertains to the members of the Highway Commission and the Attorney General of Oklahoma, was not a suit against the State.

For the reasons herein assigned, we respectfully ask that this Honorable Court reverse the decision of the Honorable Circuit Court of Appeals and enter an order herein dismissing this cause as being one against the sovereign State of Oklahoma.

Respecfully submitted,

J. BERRY KING,
Attorney General of Oklahoma.

W. C. LEWIS,
Assistant Attorney General.

Counsel for Petitioners



APPENDIX

STATE STATUTES

TOLL BRIDGE CORPORATIONS

Section 5366, C. O. S., 1921:

"The term of existence of a bridge corporation shall not exceed twenty years, and in addition to the matters required by Section 5304 every corporation formed for the purpose of constructing a bridge over any steam of water must, in the articles of incorporation, specify as follows: The place where such bridge is to be built, over what stream; that the banks on both sides of the stream where such bridge is to be built are owned by such corporation, or that it has obtained in writing the consent of the owners of the banks, where the bridge is to be built to, build the bridge; or that the banks at such place are included within and part of a public highway, and in such case that the consent in writing of the Board of County Commissioners of the county or counties for the erection of such bridge by such corporation has been obtained, and it must file a certified copy of its articles of incorporation in the office of the register of deeds of the county or counties in which the bridge or any part thereof is situated or to be located; provided, that nothing in this section shall be construed for the purpose of erecting and maintaining bridges across boundary streams or streams between the State of Oklahoma and any other state or territory."

Section 5367, C. O. S., 1921:

"No such corporation shall construct or take tolls on a bridge until authority is granted therefor by the Board of County Commissioners of the county or counties in which it is to be located."'

Section 5368, C. O. S., 1921:

"Every such corporation also ceases to be a body corporate:

"First. If, within six months from the issue of its certificate by the Secretary of State, it has not obtained such authority from the Board or Boards of County Commissioners, as mentioned in the last section; and if, within one year thereafter, it has not commenced the onstruction of its bridge, and actually expended thereon at least ten per cent of its capital stock.

"Second. If, within three years from the issuing of its certificate of incorporation, the bridge be not completed."

Section 5369, C. O. S., 1921:

"Every bridge corporation must at all times keep the bridge in good and safe condition for travel both night and day unless it be rendered impassable by reason of floods or high water; and if it be destroyed by fire or other causes the corporation must rebuild within a period of one year from such destruction or its corporate rights shall be forfeited and cease to exist."

Section 5370, C, O. S., 1921:

"Such corporation, previous to receiving and as a precedent condition to the right to receive any toll upon the use of its bridge, must set up and keep in a conspicuous place on the bridge a board on which must be written, painted or printed, in a plain and legible manner, the rates of toll which shall have been prescribed by the Board of County Commissioners, and if such corporation shall demand or receive any greater rate of toll than the rate so prescribed, it shall be subject to a fine of ten dollars for each offense, to be recovered in an action by the party aggrieved or by any public officer making the complaint."

Section 5371, C. O. S., 1921:

"No such corporation shall demand or receive toll whenever said bridge is not in good and safe condition for use, and any person having paid toll on such bridge and finding the same in a bad or unsafe condition for loaded wagons or teams, shall have the right to make complaint before any justice of the peace in the county or counties in which the bridge is located, who shall thereupon summon the said corporation, through its toll-gatherer, officers or directors, to appear before him to answer the complaint, within not over five days from the date thereof and if upon the hearing it is found that the bridge is not in a good and safe condition for use, or is in a bad condition and unsafe for loaded wagons or teams, the justice of the peace must impose a fine not less than ten dollars nor more than fifty dollars upon such corporation, and he must thereupon also enter judgment and issue

his order that no toll be collected upon said bridge until it is put in good repair and safe condition."

Section 5372, C. O. S., 1921:

"Each toll-gatherer may prevent from passing through his gate all persons, animals or vehicles subject to toll until he shall have received, respectively, the tolls authorized to be collected; and if he wilfully and unreasonably hinder or delay any such person, animals or vehicles from passing, when the lawful toll has been paid or tendered, he shall forfeit and pay for each offense a sum not less than five dollars nor more than twenty-five dollars, to be recovered in an action by the party aggrieved."

Section 5373, C. O. S., 1921:

"Every person who forcibly, wilfully or fraudulently passes over any such bridge without having paid or tendered the legal toll for himself and the property in his charge, shall, for each offense, forfeit and pay to the corporation injured a sum not exceeding twenty-five dollars, to be recovered in an action in the name of such corporation."

Section 5374, C. O. S., 1921:

"The president and secretary of every bridge corporation must annually, within twenty days from the first day of January, report under oath to the Board of County Commissioners of the county in which the articles of incorporation are filed, specifying as follows: The cost of constructing and providing all necessary appendages and appurtenances of their bridge; the amount of all

moneys expended thereon, since its construction, for repairs and incidental expenses; the capital stock, how much paid in and how much actually expended thereon; the amount received during the year for tolls and from all other sources, stating each separately; the amount of dividends made; the indebtedness of the corporation; specifying for what it was incurred; the net amount of profits; and such other facts and particulars respecting the business of the corporation as the Board of County Commissioners may require."

Section 5375, C. O. S., 1921:

"Such corporation must cause the report required in the preceding section to be published for four weeks in a newspaper published in the town or city nearest such bridge. A failure to make such report and to publish it as aforesaid, subjects the corporation to a penalty of two hundred dollars; and for every week permitted to lapse after such failure, an additional penalty of fifty dollars, payable in each case to the county or counties from which the authority to construct and take tolls is derived, at the suit of such county or counties. All such cases must be reported by the Board of County Commissioners to the county attorney, who must commence an action therefor."

WAGON ROAD CORPORATIONS.

Section 5625, C. O. S., 1921:

"Where a corporation is formed for the construction and maintenance of a wagon road, the road must be laid

out as follows: Three Commissioners must act in conjunction with the surveyor of the corporation, two to be appointed by the Board of Commissioners of the county through which the road is to run, and one by the corporation, who must lay out one proposed road and report their proceedings, together with the map of the road, to the Board of Commissioners of the county as provided in the succeeding section."

Section 5626, C. O. S., 1921:

"When the route is surveyed a map thereof must be submitted to and filed with the Board of Commissioners of each county through or into which the road runs, giving its general course, and the principal points to or by which it runs, and its width, which must in no case exceed one hundred feet, and the Board of County Commissioners must either approve or reject the survey. If approved, it must be entered of recorr on the journal of the Board, and such approval authorizes the use of all public lands and highways over which the survey runs; but the Board of County Commissioners must require the corporation at its own expense so to change and open the highways so taken and used as to make the same as good as they were before the appropriation thereof; and the corporation must so construct all crossings of public highways over and by its road and its toll-gates as not to hinder or obstruct the use of the same."

Section 5627, C. O. S., 1921:

"All wagon road corporations may bridge or keep ferries on streams on the line of their road, and must do all things necessary to keep the same in repair. They may

take such tolls only on their roads, ferries or bridges as are fixed by the Board of County Commissioners of the proper county through which the road passes, or in which the ferry or bridge is situated; but in no case must the tolls be more than sufficient to pay fifteen per cent per annum on the cost of construction, after paying for repairs and other expenses for attending to the roads, bridges and ferries. If tolls, other than as herein provided, are charges or demanded, the corporation shall forfeit its franchise and must pay to the party so charged one hundred dollars as liquidated damages."

Section 5628, C. O. S., 1921:

"When any highway or public road is taken and used by any wagon road corporation as a part of its road, the corporation must not place a toll-gate on or take tolls for the use of such highway or public road by teamsters, travelers, drovers or any one transporting property over the same."

Section 5629, C. O. S., 1921:

"The corporation must affix and keep up, at or over each gate or in some conspicious place, so as to be conveniently read, a printed list of the rates of toll levied and demanded."

Section 5630, C. O. S., 1921:

"Each toll gatherer may prevent from passing through his gates persons leading or driving animals or vehicles subject to toll, until they shall have paid, respectively, the tolls authorized to be collected.

Section 5631, C. O. S., 1921:

"Every toll-gatherer who, at any gate, unreasonably hinders or delays any traveler or passenger liable to the payment of toll, or demands or receives from any person more than he is authorized to collect, shall for each offense forfeit the sum of twenty-five dollars to the person aggrieved."

Section 5632, C. O. S., 1921:

"Every person who, to avoid the payment of the legal toll, with his team, vehicle or horse turns out of a wagon, turnpike, or plank road, or passes any gate thereon on the ground adjacent thereto, and again enters upon such road, for each offense shall forfeit the sum of five dollars to the corporation injured."

Section 5633, C. O. S., 1921:

"Every person who:

"First. Wilfully breaks, cuts down, defaces or injures any mile-stone or post on any wagon, turnpike or plank road; or,

"Second. Wilfully breaks, or throws down any gate on such road; or,

"Third. Digs up or injures any part of such road, or anything thereunto belonging; or,

"Fourth. Forcibly or fraudulently passes any gate thereon without having paid the legal toll;

"For each offense shall forfeit to the corporation injured the sum of twenty-five dollars, in addition to the damages resulting from his wrongful act."

Section 5634, C. O. S., 1921:

"The entire revenue from the road shall be appropriated:

"First. To repayment to the corporation of the costs of its construction, together with the incidental expenses incurred in collecting tolls and keeping the road in repair; and,

"Second. To the payment of the dividend among its stockholders as provided in Section 5627. When the payment of the cost of construction is completed, the tolls must be so reduced as to raise no more than an amount sufficient to pay a dividend of twelve per cent per annum and incidental expenses and to keep the road in good repair."

Section 5635, C. O. S., 1921:

"The corporation may mortgage or hypothecate its road and other property for funds with which to construct or repair their road but no mortgage or hypothecation is valid or binding unless the capital stock subscribed has been paid in and at least twenty-five per cent invested in the construction of the road and appurtenances, and then only after an affirmative vote of two-thirds of the capital stock subscribed."

Section 5636, C. O. S., 1921:

"When a wagon, turnpike or plank road is constructed, owned or operated by any natural person, this article is applicable to such person in like manner as it is applicable to corporations."

STATE ACQUISITION OF TOLL BRIDGES AND TOLL ROADS.

Section 1, Chapter 256, Session Laws, 1929:

"The State Highway Commission is hereby authorized and empowered to acquire for and on behalf of the State by purchase or condemnation proceedings, gift or grant, any toll bridge or bridges and any toll road, a part of which is a toll or privately owned bridge and all property used or needed in connection therewith, located on or serving any road or part of road, constituting a part of the State Highway System. Such power shall also extend to include any toll bridge or other privately owned bridge located on or serving any State Highway, which highway is connected by said bridge with a public highway in an adjoining state. The State Highway Commission is also granted the full power and authority to construct for and on behalf of the State free bridges over and across any stream within the State or any stream between this and an adjoining state, when such bridges will connect a State Highway or a State Highway within this State and a public highway within an adjoining state."

Section 12, Chapter 256, Session Laws, 1929:

"When any bridge is acquired under the provisions of this Act, the compensation therefor, including the franchise rights, shall be limited to not exceed the sum of (1) the actual cost of replacement of such bridge and its approaches, less reasonable deduction for actual depreciation in value; (2) the actual cost in securing such interest in real estate as was necessary for its construction; (3) the actual financing and promotion costs, not to exceed

ten per cent (10%) of the cost of the construction of the bridge and its approaches; and (4) the actual expenditures for necessary betterments and improvements."

TOLL BRIDGE CORPORATIONS.

Section 1, Chapter 257, Session Laws, 1929:

"No toll bridge corporation now or hereafter organized or existing under the laws of Oklahoma, shall be allowed to reorganize or reincorporate in any manner, having for its purpose the extension of the period of corporate existence of such corporation beyond the primary or original period of corporate existence specified by law, and no charter heretofore or hereafter issued to such corporation shall be extended in any manner or for any purpose beyond the original period of existence allowed by law; nor shall any franchise heretofore or hereafter granted any such corporation, having for its purpose the authorization to collect tolls, be in any manner or for any purpose extended, renewed or reissued over or beyond the period of the original grant as provided by law."

COUNTY COMMISSIONERS AUTHORIZED TO PURCHASE TOLL BRIDGE.

Section 10,076, C. O. S., 1921:

"The Board of County Commissioners of any county of the State of Oklahoma is hereby authorized and empowered to acquire by purchase, by agreement with the

owner or owners thereof, and by condemnation proceedings where agreement cannot be had, for the use of the public, all the rights and properties of whatsoever character, of any person, firm or corporation, used for and in the operation of any toll-bridge in said county."

SECONDARY FRANCHISE.

Exhibit A

State of Oklahoma, County of McClain. *ss.*

The Board of County Commissioners of McClain County, State of Oklahoma, met in special session on the 22nd day of April, 1911, pursuant to the call of the County Clerk as follows:

I, C. W. Hoggard, County Clerk of McClain County, Oklahoma, hereby call a meeting of the County Commissioners of McClain County, to meet at the County Seat, Saturday, April 22nd, 1911, at one o'clock P. M., for the purpose of acting upon an application of Dorset Carter and Tom Halsell, for authority and permission to construct, erect and maintain a toll bridge across the South Canadian River at or near Purcell, Oklahoma.
Dated this 17th day of April, 1911.

C. W. HOGGARD,
County Clerk of McClain County.

At which time there were present, L. L. Hawk, chairman, G. Watt Morris, member, and C. W. Hoggard, county clerk, and the following business transacted, to-wit:

The matter of acting upon the application of Dorset Carter and Tom Halsell, for authority and permission to construct, erect and maintain a Toll Bridge across the South Canadian River at or near Purcell, Oklahoma, coming on for consideration, the following resolution is by the Board adopted:

Be it Resolved by the Board of County Commissioners of McClain County, Oklahoma, that, the right, authority and privilege to construct, erect, maintain and operate a toll bridge and collect tolls thereon across the South Canadian River, be and the same is hereby granted unto Dorset Carter and Tom Halsell, or their assigns, of Purcell, Oklahoma. Said bridge to be erected within the time, as provided by law, or else this authority be null and void.

Section 2. Said bridge shall be constructed across the South Canadian River, beginning at or near a point in the City of Purcell where the East end of Jefferson Street intersects with the South Canadian River, not exceeding 1,000 feet North or South thereof, and said bridge to extend across the said river in a general Easterly direction.

Section 3. That the tolls to be collected by the said grantees or assigns, shall be as follows: Private conveyance,

Each vehicle, not exceeding two occupants..25c each way
Each additional passenger ..... 5c each way
Horse and rider .....10c each way
Footman ..... 5c each way

Public Conveyance.

Passenger vehicle and driver .....$50.00 per annum
Each additional passenger ..... 5c each way
Freight vehicles and driver ..... 25.00 per annum
The tolls above enumerated shall not be increased by the Bridge Company except as is now and may be hereafter legally provided; but may be reduced by said Bridge Company upon the posting by them of proper notice as is provided by law.

Section 4. That the grants herein made shall be perpetual, subject only to such limitations as is by law now or may be hereinafter provided.

Section 5. Nothing herein contained shall be construed as giving to the said grantees, or their assigns, the exclusive right to construct and operate a Toll Bridge over and across said stream, but the power is expressly herein reserved by the said Board of County Commissioners to make other and similar grants to other parties, firms or corporations, as in its judgment, it may deem expedient.

Section 6. That the grantees may transfer all its rights and privileges herein granted unto any individual or corporation organized under the laws of the State of Oklahoma and the said conveyance by the said grantees vest unto such individuals or corporations all the rights and privileges and concessions herein made and granted, as though such rights, privileges and grants had been made direct to such corporations, provided, however, when the said grantees herein do convey or assign their rights and privileges as herein granted, that the instrument conveying the same to be filed or recorded in the of-

fice of the Register of Deeds of McClain County. Ordered that the Board is adjourned.

Approved:

L L.. Hawk, *Chairman.*

Attest:

C. W. Hoggard, County Clerk.

Exhibit B.

In the Matter of Toll Bridge, *ss.*

Be it resolved by the Board of County Commissioners of Cleveland County, that the right, authority and the privilege to construct, erect, maintain and operate a toll bridge and to collect tolls thereon, across the South Canadian River be, and the same is hereby granted unto Dorset Carter and Tom Halsell, or their assigns, of Purcell, Oklahoma. Said bridge to be erected within the time as provided by law, otherwise this authority will be null and void.

Section 2. Said bridge shall be erected across said South Canadian River, beginning at or near a point where the public highway, located on the section line between Sections Six (6) and Seven (7), Township Six (6) North, Range One (1) West, intersects the East bank of the South Canadian River, in Cleveland County and State of Oklahoma, and on the North part of said public highway, and said bridge shall extend in a general Westerly direction across the South Canadian River to a point at or near the intersection of Jefferson Street in the City of Purcell, State of Oklahoma. And so much of said public highway situated on the section line between Sections Six (6) and Seven (7) Township Six (6) North,

Range One (1) West, not exceeding twenty feet in width and one thousand feet in length, is hereby granted to the said Dorset Carter and Tom Halsell for the purpose of the construction and erection and operation of said bridge and approaches thereto .

Section 3. That the tolls to be collected by said grantees, or assigns, shall be as follows:

Private Conveyances.

Each vehicle, not exceeding two occupants 25c each way
Each additional passenger ..... 5c each way
Horse and rider .....10c each way
Footman ..... 5c each way

Public Conveyance.

Passenger vehicle and driver .....$50.00 per annum
Freight vehicle and driver ..... 25.00 per annum
Each passenger ..... 5c each way

The tolls above enumerated shall not be increased by the Bridge Company except as is now, or may hereafter be legally provided, but may be reduced by said Bridge Company upon the posting by them of proper notices as is provided by law.

Section 4. That the grants herein made shall be perpetual, subject only to such limitations as is by law or may hereafter be provided.

Section 5. Nothing herein contained shall be construed as giving to the said grantees, or their assigns, the exclusive right to construct and operate a Toll Bridge over, and across said stream, but the power is expressly herein reserved by the Board of County Commissioners to make other and similar grants to other parties, firms

or corporations, as in its judgment it may deem expedient.

Section 6. That the grantees may transfer all the rights and privileges herein granted unto any individual or corporation, organized under the laws of the State of Oklahoma, and the said conveyance by said grantees shall vest unto such individual or corporation all the rights and privileges and concessions herein made and granted, as though such rights, privileges and grants had been made direct to such corporation, provided, however, when the said grantees herein do convey or assign their rights and privileges as herein granted, that the instrument conveying the same be filed in the office of the Register of Deeds of Cleveland County.

ATTEST:

(SEAL)

J. A. Fox, Chairman,
Board of County Commissioners,

State of Oklahoma, Cleveland County, *ss.*

I, E. B. Helms, County Clerk of the aforesaid County and state do hereby certify that the above and foregoing is a true and correct copy of part of the Commissioners' Proceedings of May 16th, 1911.

In testimony whereof I set my hand and official seal this 27th day of June, 1928.

(SEAL) E. B. HELMS, County Clerk.